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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 236.

EDWARD H. LOVE, Plaintiff in Error,

vs.

ANNIE FLAHIVE AND ANDREW J. LANSING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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Of Counsel.

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STATEMENT.

This is a suit in equity, originally brought by the plaintiff in error in the District Court of Missoula County, Montana, to have the defendant Flahive held as trustee for plaintiff of the legal title of certain lands described in the bill.

Demurrer was filed for want of facts sufficient to constitute a cause of action which was sustained by the Court and judgment entered on motion of the plaintiff on the complaint and demurrer.

On appeal, the Supreme Court of Montana affirmed the judgment of the District Court, and the case comes before this court upon a writ of error to that court.

The plaintiff based his complaint upon what he alleged was an erroneous finding of facts and decision of the Sec-

retary of the Interior in a contest between Annie Flahive and himself, wherein each asserted a right to the land by reason of priority of settlement. In the final decision of the Department, which is complained of, it was held that the plaintiff Love, by his sale of the land or of the improvements thereon to one Rundall, and his failure to assert title or claim when in a subsequent controversy between himself and Flahive, Rundall, who was present, told Love that he had bought the land from him was proof that he had abandoned his claim to it and that he would not thereafter be permitted to deny the sale and assert title under his original settlement, as against Flahive, the Grantee of Rundall, Patent subsequently issued to Flahive.

ARGUMENT.

To entitle a party to relief in equity against a patent of the government, he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear that, by the law properly administered, the title should have been awarded to the claimant.

Sparks vs. Pierce, 115 U. S., 408.
Bohall vs. Dilla, 114 U. S., 47.
Lee vs. Johnson, 116 U. S., 48.

It is also well settled that the Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition is conclusive everywhere else.

Lee vs. Johnson, 116, U. S., 48.
Johnson vs. Towsley, 13 Wall., 72.
Warren vs. Van Brunt, 19 Wall., 646,
Shepely vs. Cowan, 91 U. S., 330.

Moore vs. Robbins, 96 U. S., 530.
Marquez vs. Frisbie, 101 U. S., 473.
Vance vs. Burbank, *Id.*, 514.
Quinby vs. Conlan, 104 U. S., 420.
St. Louis Smelting and Refining Co. vs. Kemp ("Smelting Co. vs. Kemp"), *Id.*, 636.
Steel vs. St. Louis Smelting and Refining Co., 106 U. S., 447.
Baldwin vs. Starks, 107 U. S., 463.
United States vs. Minor, 114 U. S., 233.

There is no question of the jurisdiction of the Department in this case. Neither is there any charge of fraud or imposition, but at most it is claimed there was a misapplication of the law to the facts; but this claim, we think is untenable for the reason that it seems to us the only question involved in the controversy as finally decided by the Secretary, was one of fact, pure and simple.

With all of the evidence before him, taken at a hearing, the Secretary decided that:

> "It thus appears that from a preponderance of the testimony it is shown that this tract of land was not claimed by Love at the date of the sale of this land or of these logs; for it is evident that in either case (whether the sale was of the logs or of the land), Love asserted no title."

From which statement of facts he held:

> "This decision is not to be understood as holding that Love, in selling the Finley claim to Rundall, conveyed to the latter any title, or that Rundall, in selling to Flahive did so; but it appearing that this sale was made, it is conclusive evidence that Love asserted at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he relinquished all claim in and to the tract in controversy; and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him." (Record, p. 15.)

This ruling of the Department that the sale by Love of the claim, or even of the improvements on the land was an abandonment of all right under his settlement is in harmony with previous decisions of the Department. This was held as early as the case of Weber vs. Sahppell, 9 Copps, L. O., 131, and by Secretary Teller in Houston vs. Coyle, 2d L. D., 58. Again in Dashney vs. Pagganer, 27 L. D., 319, Secretary Bliss held:

> (Syllabus) "The presumption of abandonment attendant upon the sale of improvements on a tract of public land, cannot be overcome by a showing that such sale was procured through a fraud upon the rights of the vendor, where a third party, acting upon the evidence of such sale, in good faith thereafter purchases said improvements and makes entry of the land."

In the case of Potter vs. Hall, 189 U. S., 292, in which the question was whether Potter's entry made before he went outside of the line to take part in the race at the opening in Oklahoma, gave him an unauthorized advantage, after reciting the facts, Mr. Justice White speaking for the Court said:

> "It follows that the final conclusion of the Department that no such advantage resulted involved but the finding of an ultimate fact, and not a conclusion of law, and it is therefore not reviewable. If the facts found by the Secretary had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise, but such is not the case."

So, in the case at bar, the fact that Love had sold his right to the land was held as conclusively proven against him by his refusal to deny it when asserted by Rundall in his presence and in the presence of Flahive. From which fact the Secretary concluded, if he ever had any claim to

the land he had abandoned it. That this fact found by the Secretary tends to sustain his finding of an "ultimate fact," viz., that of abandonment, will not be disputed. So, in any view of the case, it is the finding of facts that was in issue and that is not reviewable.

In the case of Quinby vs. Conlin (104 U. S., 14 Otto, 420), Mr. Justice Field speaking for the court, said:

> "And we may also add in this connection, that the misconstruction of the law of the officers of the Department, which will authorize the interference of the court, must be clearly manifest and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

JURISDICTION TO MAKE THE FINDING IN QUESTION.

But, counsel for plaintiff in error insist that the Department was without jurisdiction to order the hearing of March 29, 1895, to take testimony on the question of the sale by Love of his right to the land. They base their contention on the case of Noble vs. Union River Logging Railroad, 147 U. S., 176.

We do not think the doctrine of that case has any application here. In that case it was held that under the peculiar language of the first section of the right of way act of 1875, the right of way was vested in the R. R. Co., when the Secretary decided the company was entitled to the right of way under the statute and noted his approval upon the plats, and that as it was a vested right the successor of the Secretary could not divest the Company of its property. Will it be contended the Secretary has no power to grant a motion for review or rehearing in a contest case involving only the priority of right between two claimants for a tract

of land? This is the effect of the contention of counsel, unless it is insisted that the purpose for which the hearing was held was immaterial, which question we have already discussed. We think it is settled that the Secretary has jurisdiction at any time prior to the issuing of patent to cancel any entry. He also has jurisdiction to order a hearing for the purpose of obtaining the facts to enable him to determine, in a contest case, whether either claimant, and if either, which one, has the better right, and in doing so he may overrule any and all other decisions theretofore made.

Michigan Land and Lumber Co. vs. Rust, 168, U. S., 589. Beley vs. Napthaly, 169 U. S., 353. Knight vs. U. S. Land Association, 142 U. S., 161. Brown vs. Hitchcock, 173 U. S., 473. Hawley vs. Diller, 178, U. S., 476. Harkrader vs. Goldtein, 31 L. D., 87.

In the case of Knight vs. U. S. Land Asso., *supra,* the court held:

> "It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done * * * takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government which is a party in interest in every case involving the survey and disposal of the public lands."

The distinction between cases like the one at bar and the Union Logging Railroad Co.'s case was clearly pointed out by this court in the case of Beley vs. Naphtaly, *supra,* wherein the court, after referring to the Stone case, said:

"Neither does Noble vs. Union River Logging Railroad Co., 147, U. S., 165, touch the case. The principle therein decided was in substance the same as in the Stone case, *supra*. The control of the Department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted."

But, counsel argue that as the sale by Love was null and void it could give rise to no equities between the parties.

The Secretary, in his final decision, emphasizes the position that Rundall took no title by the sale of Love to him, nor did Flahive by the sale of Rundall. But, that it was an abandonment by Love of all claim to the land. The distinction is obvious.

Again it is insisted that if the effect of Love's sale to Rundall was an abandonment, then Rundall's sale to Flahive was also an abandonment and let in Love's reasserted claim.

It seems to us counsel totally misapprehend the effect of the Secretary's decision. It may be agreed, that as Love's sale to Rundall was an abandonment to Rundall of his claim, so was Rundall's sale to Flahive an abandonment by him to Flahive of his claim. But, just how that could let in Love's abandoned claim we are unable to see.

Neither was there any *reasserted claim* by Love as referred to by counsel. It is only necessary to say that no attempt was made to show there was any reasserted claim. On the contrary, at the last hearing, Love still maintained

and swore that he had made no sale of the land to Rundall. It follows that there could have been no intention of following his abandonment by reasserting a claim. It is totally inconsistent with his contention in the Department and at variance with his testimony at the last hearing. For, although Rundall, Neptune, Lynch and Thomas, all swore to facts showing his sale to Rundall, he swore: *"Did not sell land to Rundall."* (Record, p. 13.) This being the case, there can be nothing in the contention that because Flahive did not file within three months from the date of the filing of plat in the local office, she forfeited her rights. The Government will take no advantage of this and it is only the next settler who complies with the law to whom her claim could have been forfeited. And as we have seen, Love having abandoned his claim he was not the next settler as contemplated by the statute. Moreover, Love could claim no advantage over Flahive in the matter of asserting claim to the land by filing, for, as held by the Supreme Court of Montana, the complaint does not allege the date of filing application by Love. The allegation of the complaint on this point is as follows:

> "That on the second day of January, 1889, and within the time required by law therefor, the plaintiff for the purposes hereinbefore stated duly made and executed the necessary affidavit and application to enter said land and obtain a patent therefor, and with that intention delivered the same to the officers of said local Land Office." (Record, p. 2.)

The best that could be claimed for him is that, as found by the Department, the filings were simultaneous and were made June 14, 1889. And as Love had abandoned his claim and made no new settlement after such abandonment in 1883, he had no right to assert, because of settlement or residence, and the land was properly awarded to Flahive.

McCalla vs. Acker, 29 L. D., 203, and cases there cited.

It follows that the decision of the Supreme Court of Montana was correct upon all the points involved in the assignment of errors in this court by the plaintiff in error, and should be in all things confirmed.

Respectfully submitted,

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